



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 25, 2003

Mr. Jeffrey S. Young
Associate General Counsel
Texas Tech University Health Sciences Center
3601 4th Street, Stop 6246
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OR2003-2811

Dear Mr. Young:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179250.

The Texas Tech University Health Sciences Center (the "center") received five requests from the same requestor for information related to communications between specified individuals concerning the employment of a named individual and specific research studies, certain grant application information, and requests for sabbatical leave. You have submitted a copy of your response to the requestor's January 24, 2003 request for information regarding certain communications between the center and the Food and Drug Administration and the Office for Human Research Protections, which indicates that you have released the information responsive to that request. You state that you have released some of the requested information related to the four remaining requests for information. However, you claim that portions of the remaining requested information are excepted from disclosure under sections 552.101, 552.107, 552.110, 552.111, and 552.117 of the Government Code. Additionally, you have notified Dr. Thomas Butler ("Butler"), Chiron Corporation ("Chiron"), and Pharmacia & Upjohn ("Pharmacia"), third parties whose proprietary interests may be implicated, of the request for information pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Chapter 552 of Government Code in certain circumstances). The center has submitted the information at issue to this office. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have not provided this office with a copy of the requestor's January 23, 2003 written request for information as prescribed by section 552.301. *See* Gov't Code § 552.301. Instead, you have submitted a copy of your letter to the requestor explaining that you understand his January 23, 2003 request to be for "[a]ny grant applications or grant correspondence between [a named individual] and the Office of Sponsored Programs from January 2000 to December 2002."¹ Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). You assert sections 552.110 and 552.117 of the Government Code, both of which provide compelling reasons to overcome the presumption of openness, in regard to the information responsive to the January 23, 2003 request for information. Thus, we will address your arguments.

Exhibits G1 and H1

Trade Secret and Certain Commercial or Financial Information Under Section 552.110

First, we will address the submitted exhibits that we have labeled as Exhibits G1 and H1. You notified Butler, Chiron, and Pharmacia of their right to submit arguments against the disclosure of the information in Exhibit G1. An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, none of the interested third parties have submitted to this office any reasons explaining why their information should not be released. Therefore, these parties have provided us with no basis to conclude that they have a protected proprietary interest in any of the information in Exhibit G1. *See, e.g.*, Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

¹We note that such information is not at issue in any of the requestor's remaining four requests for information.

However, in regard to Exhibit G1, you assert section 552.110(a) of the Government Code. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See Gov't Code § 552.110.* Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See Gov't Code § 552.110(a).* A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); Open Records Decision Nos. 552 at 2 (1990), 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;

(5) the amount of effort or money expended by [the company] in developing this information; and

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982), 306 (1982), 255 (1980), 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

You state that the highlighted information in Exhibit G1 “pertain[s] to the manner in which [a named individual] proposed to carry out his research, including specific scientific methods and procedures.” Further, you contend that “if disclosed, another researcher could commercially use the scientific methods and procedures for monetary gain.” After reviewing the center’s arguments, we conclude that you failed to establish a *prima facie* case that any of the information you have highlighted in Exhibit G1 qualifies as a trade secret for purposes of section 552.110(a) of the Government Code because you did not address the qualifying factors of trade secret information as expressed in the Restatement. Further, as you do not claim that any of the submitted information is excepted under section 552.110(b) of the Government Code, we need not address the applicability of that aspect of section 552.110 to the submitted documents. Thus, you have failed to demonstrate that any of the highlighted information in Exhibit G1 is excepted under section 552.110 of the Government Code, and it must be released.

Certain Personal Information Under Section 552.117

In regard to the highlighted information in Exhibit H1, you assert section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. We note that section 552.117 is not applicable to current or former officials’ or employees’ dates of birth. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You state that the employee in question “has expressed an interest in not disclosing certain personal information to the public.” However, the center may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

Thus, the center may not withhold this information under section 552.117 if this employee did not make a timely election under section 552.024 to keep his information confidential. If the employee in question timely elected to keep his personal information confidential, you must withhold his home address, home telephone number, and social security number in Exhibit H1 under section 552.117 of the Government Code.

Federal Social Security Act

However, we note that if this employee did not make a timely election under section 552.024, his social security number may nevertheless be confidential under federal law. A social security number may be withheld in some circumstances under section 552.101² in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers in the responsive information are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Public Information Act (the "Act") on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the center should ensure that no such information was obtained or is maintained by the center pursuant to any provision of law enacted on or after October 1, 1990.

Exhibits E, F, G, and H

We will now address the exceptions you raise with respect to the center's information in Exhibits E, F, G, and H.

Certain Legal Matters Under Section 552.107

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating

²Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that the information you have marked in Exhibits E and G as section 552.107 information was: 1) communicated between the center and its attorneys; 2) was not intended to be disclosed to third parties; and 3) was made in the furtherance of the rendition of professional legal services. Based on your representations and arguments and our review of this information, we find that you have demonstrated that a portion of the information in Exhibits E and G, which we have marked, is protected by the attorney-client privilege and is therefore excepted from disclosure under section 552.107. However, we find that, although you assert that certain documents were communicated between the center and its attorneys in furtherance of the rendition of legal services, such documents were subsequently communicated to other individuals for purposes unrelated to the rendition of legal services. Open Records Decision No. 676 at 9 (2002). Further, although you state that certain documents were created at the request of an attorney, you have failed to demonstrate that these documents were communicated between the center and its attorneys. *Id.* at 7. Thus, section 552.107 of the Government Code is not applicable to this information.

Agency Memoranda Under Section 552.111

You also assert section 552.111 of the Government Code in regard to some of the highlighted information in Exhibits E, G, and H. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a

party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). Having reviewed the information at issue, we conclude that only the information we have marked in Exhibit G consists of advice, opinions, recommendations, or other material reflecting the policymaking processes of the center. Therefore, you may withhold this information under section 552.111 of the Government Code. However, the remainder of the information you have identified as section 552.111 information does not constitute material reflecting the policymaking process of the center. Therefore, this information may not be withheld under section 552.111 of the Government Code.

Section 161.032 of the Health and Safety Code

Finally, section 552.101 encompasses information protected by other statutes. Section 161.032 of the Health and Safety Code provides in part:

(a) The records and proceedings of a medical committee are confidential and are not subject to court subpoena.

....

(c) Records, information, or reports of a medical committee . . . and records, information, or reports provided by a medical committee . . . to the governing body of a public hospital . . . are not subject to disclosure under Chapter 552, Government Code.

....

(f) This section . . . do[es] not apply to records made or maintained in the regular course of business by a hospital

Section 161.031(a) defines a "medical committee" as "any committee . . . of (3) a university medical school or health science center" Section 161.031(b) provides that the "term includes a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution." Section 161.0315 provides in relevant part that "[t]he governing body of a hospital, medical organization [or] university medical school or health science center . . . may form . . . a medical committee, as defined by section 161.031, to evaluate medical and health care services" Health & Safety Code § 161.0315(a).

You inform us that the center's Institutional Review Board (the "IRB") is a university health sciences center committee established to oversee and review human research activities pursuant to federal law.³ Federal regulations define an IRB as

any board, committee, or other group formally designated by an institution to review, to approve the initiation of, and to conduct periodic review of, biomedical research involving human subjects. The primary purpose of such review is to assure the protection of the rights and welfare of the human subjects

21 C.F.R. § 56.102(g). Thus, we conclude that the center's IRB is a medical committee created pursuant to federal law, and consequently, the IRB falls within the definition of "medical committee" set forth in section 161.031 of the Health and Safety Code. Therefore, the submitted documents that reflect committee proceedings and deliberations relating to standards and quality of care are confidential under section 161.032 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code. *See Jordan v. Court of Appeals*, 701 S.W.2d 644, 647-48 (Tex. 1985) (determining that statutory predecessor extended to documents prepared by or at direction of committee in order to conduct open and thorough review, and privilege extends to minutes of committee meetings, correspondence between members relating to deliberation process, and any final committee product); *see also* Open Records Decision No. 591 (1991) (concluding that purpose of predecessor statute was to encourage frank discussion by medical professionals). We have marked the information in Exhibits E, F, and G that must be withheld.⁴

³See 42 U.S.C. § 289(a) (providing that Secretary of Health and Human Services shall by regulation require that each entity which applies for grant, contract, or cooperative agreement for any project or program which involves conduct of biomedical or behavioral research involving human subjects submit in or with its application for such grant, contract, or cooperative agreement assurances satisfactory to Secretary that it has established "Institutional Review Board" to review biomedical and behavioral research involving human subjects conducted at or supported by such entity).

⁴As we are able to make this determination, we need not address your remaining argument regarding Exhibit F.

However, the remainder of the information to which you have claimed section 161.031 of the Health and Safety Code was not generated or reviewed by the IRB in its investigation and review process. The center has informed this office that the remaining information was created in relation to a grievance that was filed with and mediated by a separate entity, the Faculty Grievance Committee. Therefore, the grievance was not part of an IRB investigation or review proceeding, and, consequently, this information is not confidential under section 161.032 of the Health and Safety Code. *See Memorial Hospital v. Honorable F. Scott McCown*, 927 S.W.2d (Tex. 1996) (statutory privilege attaches to investigation, review, or other deliberative proceeding of medical committee); *see also Barnes v. The Honorable John Whittington*, 751 S.W.2d 493 (Tex. 1988) (privilege extends only to information generated by hospital committee in its investigation or review process). Thus, this information, which we have marked, must be released to the requestor.

Summary

In regard to Exhibits G1 and H1, we conclude that: 1) you may not withhold Exhibit G1 under section 552.110 of the Government Code because you failed to establish a *prima facie* case that any of the information you highlighted qualifies as a trade secret for purposes of section 552.110(a), and, as you did not claim section 552.110(b), we did not address the applicability of that aspect of section 552.110 to the submitted documents; 2) if the employee in question made a timely election under section 552.024, you must withhold his home address, home telephone number, and social security number in Exhibit H1 under section 552.117 of the Government Code; and 3) if the employee in question did not make a timely election under section 552.024, his social security number may nevertheless be confidential under federal law if it was obtained or is maintained by the center pursuant to any provision of law enacted on or after October 1, 1990.

In regard to Exhibits E, F, G, and H, we conclude that: 4) the information we have marked in Exhibits E and G may be withheld under section 552.107 of the Government Code; 5) the additional information we have marked in Exhibit G may be withheld under section 552.111 of the Government Code; 6) the information we have marked in Exhibits E, F, and G is confidential under section 161.032 of the Health and Safety Code and must be withheld under section 552.101 of the Government Code; and 7) the remaining information in Exhibits E and H is not confidential under section 161.032 of the Health and Safety Code and may not be withheld under section 552.101 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

WMM/sdk

Ref: ID# 179250

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